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No. 06-278

IN THE
SUPREME COURT OF THE UNITED STATES

JUNEAU SCHOOL BOARD; DEBORAH MORSE,
Petitioners,

v.

JOSEPH FREDERICK,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

The National School Board Association and its joint *amicus* respectfully move this Court to grant them leave to file the attached brief *amici curiae* in this case. Petitioners have consented to the filing of this brief. A letter attesting to their consent has been submitted to this Court. Respondents have refused to consent.

The National School Boards Association (NSBA) is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators (AASA), founded in 1865, is a professional organization representing over 14,000 educational leaders across America and in other countries. AASA's mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

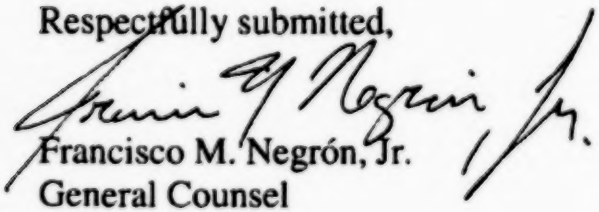
Amici are strongly interested in ensuring that school boards and school administrators have the authority to regulate student speech in situations where students are entrusted to their care and tutelage. Maintaining a positive learning environment while appropriately respecting students' First Amendment rights is crucial to school leaders being able to fulfill their public education mission.

Amici believe that the Ninth Circuit's decision conflicts with First Amendment jurisprudence in other circuits with respect to student expression and aggravates the

already existing legal confusion that school administrators face when seeking to balance the operational needs of their schools to maintain positive learning environments with student free speech rights. If allowed to stand, the decision forces them at the risk of personal liability to endure, during school time at school-sponsored activities with teachers and other students attending, students who choose to openly flaunt the school's authority to maintain a learning environment consistent with its mission of deterring drug and alcohol abuse. This infringes on the authority of school boards and administrators to make and enforce reasonable and appropriate policy decisions for their schools about how to fulfill their educational mission. As the national organizations representing school leaders who adopt policies and oversee the operation of schools, *Amici* are uniquely positioned to advise this Court of the practical effects the Ninth Circuit's decision will have on schools if allowed to stand.

For these reasons, *Amici* request the opportunity to advise this Court on the need for clarity in First Amendment jurisprudence related to student expression.

Respectfully submitted,



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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association (NSBA) is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators (AASA), founded in 1865, is a professional organization representing over 14,000 educational leaders across America and in other countries. AASA's mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

Amici believe that the Ninth Circuit's decision conflicts with First Amendment jurisprudence in other circuits with respect to student expression and aggravates the already existing legal confusion that school administrators face when seeking to balance the operational needs of their schools to maintain positive learning environments with student free speech rights. If allowed to stand, this decision forces administrators—at the risk of personal liability—to tolerate blatant challenges to the school's authority to maintain a learning environment consistent with its mission of deterring drug and alcohol abuse, during school time at school-sponsored activities. This infringes on the authority and curtails the ability of school boards and administrators to

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[1] This brief is submitted on motion to this Court for leave to file. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

make and enforce reasonable and appropriate policy decisions for their schools to fulfill their educational mission.

SUMMARY OF ARGUMENT

This Court should grant review of this case for two primary reasons: (1) to afford critical guidance to school administrators regarding student free speech rights; and (2) to rectify the Ninth Circuit's departure from established qualified immunity principles.

Frederick presents this Court with a critical opportunity to review the scope of student free speech rights in the nation's public schools, which it has not done in 20 years. Granting review will allow the Court to clarify existing jurisprudence, including confusion among federal courts in the following areas: (1) whether a school can define its educational mission to include anti-drug messages; (2) whether a school district can consistently promote and enforce its educational mission in all school authorized and supervised settings, which take place both on and off-campus; (3) whether "plainly offensive" speech under *Fraser* is limited to sexual speech or also encompasses anti-drug and other messages inimical to a school's educational mission; (4) whether *Fraser* applies to manner or to content of student speech, or both; (5) whether *Tinker* establishes a two-prong analysis of student speech, requiring substantial disruption *or* intrusion on the rights of other students, or in all cases demands evidence of substantial disruption even if the speech intrudes on the rights of others; and (6) whether the phrase "Bong Hits 4 Jesus" is speech worthy of First Amendment protection because it is nonsensical.

Despite the lack of clarity in the law as to these questions, *Frederick* imposes a new legal standard on school administrators—that of a lawyer. While school administrators perform a myriad of tasks on a daily basis, they are not lawyers. Instead, they are professional

educators responsible for the orderly operation of our nations' public schools and the education of our children. The Ninth Circuit's decision that a school principal is not entitled to qualified immunity for her decision to disallow a banner reading "Bong Hits 4 Jesus" imposes a new and unreasonably heightened standard that undermines a school administrator's ability to function as a school site leader and to enforce school district policies.

INTRODUCTION

Imagine that you are Principal Deborah Morse. The Juneau School District has charged you with the day-to-day functioning and smooth operation of the Juneau-Douglas High School. In light of the upcoming 2002 Winter Olympics in Salt Lake City, Utah, the Juneau School District decides to allow students at your high school to attend the Olympic Torch Relay. The relay will pass directly in front of your high school and several of your students will serve as torchbearers. This is a significant event in your community and it offers your students a valuable educational experience.

On the day of the relay, your students, teachers, and administrators line-up along the street in front of your school to watch the procession. When the torchbearers approach, several of your students unfurl a 20-foot long banner emblazoned with the phrase "Bong Hits 4 Jesus."

With television cameras bearing down on you, what do you do? Would you do what Principal Morse did, and ask the students to take down the sign?

Each day in America, in approximately 15,000 school districts over 225,000 school administrators, just like Principal Morse, must make quick judgments involving the conflict between student free speech rights and a school district's responsibilities to the entire school community. In order to make this judgment, the student free speech jurisprudence in this country mandates that school

administrators engage in a complicated legal calculus, which includes:

1. What First Amendment standards govern the speech?
2. Does the speech implicate the school district's educational mission?
3. Can the district enforce this particular educational mission?
4. Where did the speech take place?
5. If the speech occurred off-campus, can it be regulated?
6. If *Fraser* applies, does the speech have to be sexual to be considered "plainly offensive?"
7. Does *Fraser* apply to manner or to content of the speech, or both?
8. If *Tinker* applies, does it require a two-prong analysis of the student's speech or only substantial disruption?

This complex analysis must be applied to a huge gamut of student speech ranging from expression of religious views,[2] to racially offensive statements,[3] to violent or threatening messages,[4] to promoting of activities that are

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[2] *E.g., Harper v. Poway Unified Sch. Dist.* 445 F.3d 1166 (9th Cir. 2006) (student T-shirt expressing religious objection to homosexuality); *Bannon v. School Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) (student mural with religious images); *Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (student distribution of holiday gift containing religious message); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) (salutatorian speech containing proselytizing comments).

[3] *E.g., Scott v. School Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003) (display of Confederate flag); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000) (same).

[4] *E.g., Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996) (student threats of violence against school counselor); *Governor Wentworth Regional Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410

illegal or inappropriate for children.[5] Administrators must make these decisions at the risk of a legal challenge,[6] and if the Ninth Circuit is correct, personal liability. The Ninth Circuit's opinion leaves little room for a miscalculation in an administrator's legal analysis even though their actions may be reasonable under the circumstances. Furthermore, the court's refusal to provide Principal Morse with qualified immunity creates an untenable chilling effect on the hundreds of thousands of administrators who are charged with maintaining order and discipline in our schools and with ensuring that students, while in the schools' charge, receive messages that promote the districts' educational goals. It also promotes indecorous behavior by students and detracts from a school district's focus on a positive learning environment.

(D.N.H. 2006) (student wearing "tolerance patch" in threatening environment).

[5] *E.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (student T-shirt promoting anti-social, destructive and inappropriate behavior); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999) (marching band performance of song promoting illegal drug use).

[6] A recent Westlaw search by *Amici* of legal databases containing federal and state cases related to education yielded approximately 800 cases involving student free speech claims since this Court's 1969 decision in *Tinker*. This, of course, represents only the tip of the iceberg of the total number of legal challenges brought asserting free speech violations since it reflects neither claims threatened but never brought nor those resolved without a reported decision.

REASONS FOR GRANTING THE WRIT

I. This Court Should Provide Much Needed Clarification Of Student Free Speech Jurisprudence To Guide Schools In Balancing Students' Free Speech Rights With The Schools' Need To Perform Their Educational Function.

This Court has recognized that the First Amendment free speech rights of students must be balanced against the need of schools to provide a "safe, secure and effective" educational environment. *Tinker v. Des Moines Indep. Community Sch.*, 393 U.S. 503, 507 (1969) (balancing constitutional freedoms of individuals with school's need to perform educational function). *Accord Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1176 (9th Cir. 2006) (balancing free speech rights of students and the "special need to maintain a safe, secure and effective learning environment"). Indeed, student free speech rights "are not automatically coextensive with the rights of adults in other settings, and must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal citations omitted).

This Court's rulings on student expression have resulted in courts tending to place the student speech at issue in one of three categories, each governed by a separate standard, although the speech may not neatly fit in any of them or may reasonably be seen as belonging in more than one. The first category involves school-sponsored speech, which schools may regulate so long as the exercise of such control is reasonably related to "legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. The second category involves "plainly offensive" speech inconsistent with the school's educational mission, *Bethel Sch. Dist. No.*

403 v. Fraser, 478 U.S. 675 (1986) (regulating student assembly speech involving extensive sexual metaphor). Seemingly by default, courts tend to place all other student speech into a third category governed by *Tinker* (school could not regulate students publicizing their objections to the hostilities in Vietnam by wearing black armbands). In *Tinker*, the Court declared a school district may regulate a student's political speech if the speech would "impinge upon the rights of other students," or if the speech would result in "substantial disruption of or material interference with school activities." 393 U.S. at 509, 514.

Because circuit courts differ, often markedly, in their application of *Hazelwood, Fraser* and *Tinker*, the specific contours of the law remain unclear, forcing schools into the difficult task of trying to make some sense of confusing decisions that obscure the proper balance between school authority to maintain an orderly environment conducive to learning and respect for students' free speech rights. The Ninth Circuit's decision only magnifies this lack of clarity in student free speech jurisprudence, while ironically declaring the law clearly established and holding Principal Morse personally liable for failing to recognize the purported clarity. *Amici* urge this Court to accept this case to provide the definitive guidance to school leaders that remains elusive under current law.

A. This Court Should Clarify That School Districts Have The Right To Define And To Enforce Their Educational Mission.

A school district "need not tolerate student speech that is inconsistent with its basic educational mission." *Hazelwood*, 484 U.S. at 266, *quoting Fraser*, 478 U.S. at 685. Courts routinely defer to local school district authority in defining its educational mission, and grant particular deference to school administrators in regulating speech

inconsistent with that mission. *E.g.*, *Poling v. Murphy*, 872 F.2d 757, 761 (6th Cir. 1989) (deferring to decision of local elected school board the question of whether student discipline imposed for derogatory comments was appropriate); *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F.Supp.2d 550, 563 (N.D. Tex. 2004) (school district properly regulated speech inconsistent with school district's "abstinence-only" educational process); *Broussard v. School Bd.*, 801 F.Supp. 1526, 1536 (E.D. Va. 1992) ("The federal courts, ill-suited as they are to second guess decisions of school authorities, should interfere only in the most stringent circumstances") (citations omitted). In fact, this Court has acknowledged that the "determination of what manner of speech in the classroom or in a school assembly is inappropriate properly rests with the school board." *Fraser*, 478 U.S. at 683.

The Ninth Circuit's decision in *Frederick*, however, disregards precedent from this Court and other courts, and circumscribes the manner in which school districts may define and implement their educational mission. In essence, the Ninth Circuit minimizes a school district's legitimate and good faith efforts to enforce anti-drug messages as part of their educational mission by simply concluding that the Juneau School District was "not entitled to suppress speech that undermines whatever missions the school defines for itself." *Frederick v. Morse*, 439 F.3d 1114, 1120 (9th Cir. 2006).

The Ninth Circuit's decision also conflicts with the decisions of other courts granting school districts the right to incorporate anti-drug messages into their educational mission, and to uphold this mission by regulating inconsistent student speech. *E.g.*, *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (upholding under *Fraser* school district's prohibition of Marilyn Manson T-shirts in light of school's dress code prohibiting clothing with offensive illustrations, or drug, alcohol, or tobacco

slogans; principal considered message offensive to the school's basic educational mission by promoting destructive conduct and demoralizing values and mocking a religious figure); *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980) (upholding under *Tinker*, school district's refusal to distribute off campus student newspaper containing advertisement from store selling drug paraphernalia); *Nixon v. Northern Local Sch. Dist.*, 383 F.Supp.2d 965, 971 (S.D. Ohio 2005)(stating that offensive speech under *Fraser* includes speech that promotes suicide, drugs, alcohol or murder); *Gano v. School Dist. No. 411*, 674 F.Supp. 796, 798-99 (D. Idaho 1987) (T-shirt with caricature of school administrators holding liquor and appearing drunk on school property could be regulated).

By imposing restrictions on the right of school districts to establish their own educational mission, including anti-drug messages, and to uphold this mission by regulating inconsistent student speech, the Ninth Circuit apparently sought to prevent what it viewed as unbridled school discretion from swallowing the *Fraser* rule. But in fact, what the court effectively did was to eliminate the rule entirely. Accordingly, this Court should grant review to remove the Ninth Circuit's unwarranted restrictions on a school district's right to define its educational mission.

B. This Court Should Clarify That Schools May Enforce Their Educational Mission In All Settings Where Students Are Entrusted To Their Care And Tutelage.

In an attempt to support its rationale that a school district may not enforce its anti-drug education mission, the Ninth Circuit attempted to distinguish the *Boroff* decision by stating,

> even if we were inclined to adopt *Boroff*, this case is distinguishable in one key respect. Boroff sought to wear his T-shirt in the classroom, where its message would be more likely to interfere with the school's core educational mission. Frederick's banner, by comparison, was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials. It most certainly did not interfere with the school's basic educational mission.

Frederick, 439 F.3d at 1123.

This distinction erroneously equates the educational mission solely with classroom teaching and ignores the reality that today's teaching environment extends to co-curricular and extra-curricular activities occurring outside the classroom walls, such as science camps, museum field trips, Olympic torch relays, school dances, and sporting events. It also suggests a school district may not (or cannot) uphold its educational mission consistently across multiple settings—the football game, the field trip, the classroom, the school supervised activity—all situations where students remain under the custodial care and tutelage of the school.

The Ninth Circuit's ruling if allowed to stand would severely hamper the ability of school officials to maintain safe and orderly environments except in the classroom or during strictly defined curricular activities. Before responding to daily situations involving students outside the classroom or curricular activities, school administrators and teachers would be forced to engage in a detailed, rigorous legal analysis to determine whether under all the circumstances they had the responsibility and the authority to act. Not only is this unworkable because school officials must often react quickly. It is also unworkable because the

legal context in which the duty or authority of school officials to act to protect students in a variety of situations that do not occur on school premises are not always clearly delineated. *Porter v. Ascension Parish School Bd.*, 393 F.3d 608 (5th Cir. 2004) (student disciplined for graphic and violent sketch depicting armed siege of school that was created off-campus and later brought to school.); *Layshock v. Hermitage Sch. Dist.*, 412 F.Supp.2d 502 (W.D. Pa. 2006) (student disciplined for creating an online parody profile of the school's principal on an off-campus computer); *Collins v. Prince William County Sch. Bd.*, 142 Fed.Appx. 144 (4th Cir. 2005) (unpublished) (student expelled under school district policy allowing school officials to discipline students for off-campus offenses). As such, this Court should clarify that schools are entitled to enforce their educational mission and to maintain order in all settings where students are entrusted to their care and tutelage.

C. This Court Should Clarify The Meaning Of "Plainly Offensive" Speech.

Courts are divided on whether this Court in *Fraser* created an exhaustive list of speech that may interfere with a school's educational mission, whether it simply provided guidance on the types of speech that can be regulated, or whether solely addresses sexual speech.

In *Frederick*, the Ninth Circuit limits *Fraser* to those cases involving sexual speech that can result in campus disorder among those "new to adult hormones." *Frederick*, 439 F.3d at 1119. Under *Frederick*, speech must be "'plainly offensive' in the way sexual innuendo is," before it can be regulated. *Frederick*, 439 F.3d at 1119.

The Second Circuit has likewise limited *Fraser* to sexually explicit speech. In the recent decision of *Guiles v. Marineau*, __F. 3d __, 2006 WL 2499083 (2d Cir. Aug. 30, 2006), the Second Circuit narrowly defined *Fraser's* reach to

student speech that is "lewd," "vulgar," "indecent," or "plainly offensive." The Second Circuit equated "plainly offensive" speech with lewd, vulgar and indecent. . .meaning speech, which "connote[s] sexual innuendo or profanity." *Id.* at *7. In sum, *Guiles* held that *Fraser* applies solely to "speech containing sexual innuendo and profanity." *Id.* at *8.

In contrast, other courts have extended the application of "plainly offensive" beyond speech with sexual connotations. *E.g., Boroff*, 220 F.3d 465 (Sixth Circuit upheld ban on T-shirts based on the reasonable view that they promoted anti-social and destructive behavior, demoralizing values and disrespect of the religious views of other students, all of which were contrary to the school's educational mission); *Nixon*, 383 F.Supp.2d 965 (speech promoting suicide, drugs, alcohol, or murder or speech containing vulgar language, or graphic sexual innuendos can be regulated under *Fraser*); *Barber v. Dearborn Pub. Sch.*, 286 F.Supp.2d 847, 859 (E.D. Mich. 2003) (school officials may curtail speech that is lewd, obscene, or vulgar, including speech related to alcohol or drugs); *Broussard*, 801 F.Supp. at 1536 (speech "need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent or offensive is subject to limitation"); *Gano*, 674 F.Supp. 796 (T-shirt with caricature of three school administrators holding liquor and appearing drunk on school property was "clearly offensive").

Based on the inconsistencies among the lower courts, this Court should clarify *Fraser's* scope and expressly indicate whether its "plainly offensive" standard includes more than sexual speech.

D. This Court Should Resolve The Differences Among Federal Courts Regarding Whether *Fraser* Applies To Manner Or To Content Of Student Speech, Or Both.

Federal courts also differ regarding whether *Fraser* permits a school to regulate speech conveyed in a plainly offensive manner, speech that contains content inimical to the school's educational mission, or both. Factually, *Fraser* itself involved school discipline of a student for his "manner of speech," and not the speech's content, 478 U.S. at 682-83, 685, leading some courts to limit the decision's application to the manner of speech. *See, e.g., Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003) ("when speech in school falls within the lewd, vulgar, and plainly offensive rubric, it can be said that *Fraser* limits the form and manner of speech, but does not address the content of the message"); *Nixon,* 383 F.Supp.2d 965, 971 (school district's prohibition of student T-shirt, which stated "Homosexuality is a sin," not justified under *Fraser* standard; court determined *Fraser* and its progeny deal with speech that is offensive due to manner in which it is conveyed); *Broussard*, 801 F.Supp. at 1536 (schools have power to regulate speech presented in lewd, indecent or offensive manner).

However, other courts have emphasized *Fraser*'s underlying rationale of allowing schools to regulate student speech to ensure that they can properly carry out their educational mission. In *Fraser* the Court focused on the school's function in teaching civil discourse. There is no reason that other equally important educational goals should not similarly outweigh the right of students to express messages that impede schools from effectively ensuring that students gain knowledge and skills critical to their development into healthy and productive citizens. This has led some courts to examine the content of the message to

determine whether the *Fraser* standard applies. *E.g.*, *Boroff*, 220 F.3d at 471 (examining content of message to determine ban of T-shirt with a pro-drug message in conflict with the school district's educational message was permissible).

In light of these differing applications of *Fraser*, this Court should accept review to establish a clear standard for determining when and what speech is "plainly offensive."

E. This Court Should Clarify Whether *Tinker* Establishes A Two Prong Analysis Of Student Speech Or Requires Only Substantial Disruption.

This Court in *Tinker* permitted school authorities to regulate student political speech in two circumstances. In the first, a public school can regulate student speech when it results in "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. In the second, a school can proscribe student speech that collides with the rights of other students to be "secure and to be let alone" or that would "impinge upon the rights of other students." *Id.* at 508, 509.

Despite this Court's delineation of two distinct situations justifying regulation of student speech, a number of decisions following *Tinker* have conflated the two prongs and focused exclusively on evidence of substantial disruption. *E.g.*, *Nixon*, 383 F.Supp.2d at 974-75 (requiring a showing of material disruption as evidence of the intrusion on rights of others).

In *Frederick*, the Ninth Circuit likewise limited its analysis to whether the banner at issue disrupted school activities. The court did not determine whether the banner implicated the second prong of *Tinker* and the right of students to be let alone and to be free from derogatory remarks directed at a student's religion. Arguably, the phrase "Bong Hits 4 Jesus" disrespects students with sincerely held Christian religious beliefs, mocks a Christian

religious figure, and trivializes other expressions of faith. Although the school district in this case did not seek to justify its action against Frederick on the basis that his speech interfered with the religious rights of other students, evidence in the record suggests that Frederick recognized that his banner could be regarded as offensive to students of devout Christian faith. Therefore, the Ninth Circuit would have had some basis to address the second prong of *Tinker* but instead engaged in an analysis that inappropriately truncates *Tinker*'s holding into one prong.

Other courts have treated the interference with the rights of others as a separate basis on which the regulation of speech may be justified. For instance, in *Poway,* 445 F.3d 1166, the Ninth Circuit recently ruled that schools could suppress derogatory and injurious remarks directed at a student's minority status such as race, religion, and sexual orientation without a showing of disruption. *Accord West v. Derby Unified Sch. Dist., No. 260,* 206 F.3d 1358, 1366 (10th Cir. 2000) ("display of the Confederate flag might ... interfere with the rights of other students to be secure and let alone").

Poway based its reasoning on this Court's recognition that the "right to be let alone" is "'the right most valued by civilized men.'" *Poway*, 445 F.3d at 1178 (citations omitted). Accordingly, the *Poway* court concluded that the privacy interest in avoiding unwanted communication is most important "'when persons are 'powerless to avoid' it," as in the case of minors subject to mandatory school attendance requirements who are essentially a "'captive audience.'" *Id.* (internal citations omitted).

Due to confusion over the standard established by *Tinker*, this Court should grant review and clearly state whether *Tinker* contains two independent prongs or is limited to speech that causes a substantial disruption, even where the speech encroaches on the right to be left alone.

F. This Court Should Clarify Whether "Bong Hits 4 Jesus" Is Speech Worthy Of First Amendment Protection.

It has been long established that, "[t]he primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to *convey a desired message*." *Young v. American Mini Theater*, 427 U.S. 50, 76 (1976) (citations omitted) (emphasis added). This fundamental tenet has led courts to protect political, social, and religious speech, but to allow regulation of commercial, disruptive, plainly offensive or nonsensical speech. When speech approaches the nonsensical, it receives less, if any, First Amendment protection, precisely because there is no particular desired message being conveyed. Protecting a student's deliberate attention-seeking display of a nonsensical statement under a free speech analysis would vitiate the First Amendment. This concept was clearly enunciated by the Sixth Circuit in *Salehpour v. University of Tennessee*, 159 F.3d 199, 208 (6th Cir. 1998) *cert. denied*, 526 U.S. 1115 (1999). The court stated,

> [W]e find that, here, Plaintiff's claim fails at the inception where his alleged speech, i.e., his conduct of disrupting the classroom milieu for the sole purpose of advancing and pursuing his admitted power struggle" with the University, was not protected activity.
>
> We cannot convey strongly enough that the purpose of this holding is not to discourage legitimate debate....Indeed, the First Amendment right of freedom of expression of political, social, religious, and other such views may be most precious in an educational setting. However, as in the

> instant case, where the expression appears to have no intellectual content or even discernable purpose, and amounts to nothing more than expression of a personal proclivity designed to disrupt the educational process, such expression is not protected and does violence to the spirit and purpose of the First Amendment.

As in *Salehpour*, Frederick sought to attract attention by displaying at the Olympic torch parade a banner containing words he admitted to be "just nonsense," rendering his teenage publicity stunt designed to garner students their 15-minutes of fame undeserving of First Amendment protection in the first place.

To undertake this inquiry in no way diminishes the reasonableness of Principal Morse's view that the banner displayed a pro-drug message and thus was contrary to school district policy. Not only have courts long deferred to the judgment of school administrators in assessing the meaning and effect of student speech. *See Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) ("In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion."). But also there was evidence that Frederick knew that bong hits referred to smoking marijuana, although he asserted he used the words as nonsense, not to advocate drug use. Where the speaker intends to convey no particularized idea as here, the reasonable, though erroneous, attribution by hearers of a specific viewpoint does not endow the expression with First Amendment protection. In other words, whether the words are deemed nonsense or a pro-drug message, Principal Morse's action in regulating the speech would be constitutionally acceptable. Accordingly, this Court should determine whether "Bong Hits 4 Jesus" is speech worthy of First Amendment protection at all.

II. The Ninth Circuit's Departure From Well-Established Qualified Immunity Principles Denies School Administrators Their Longstanding Authority To Ensure A Positive Learning Environment.

Qualified immunity safeguards "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity also demands that the law be clearly established before its protections may be removed. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Before denying immunity, a court must be satisfied that the right was so clearly established "that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, as the Ninth Circuit has construed this Court's rulings, the "*specific* contours of the law" must be well developed or sufficiently clear. *Rudebusch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002). The immunity inquiry acknowledges that "reasonable mistakes can be made as to the legal constraints on particular [official] conduct. " *Saucier*, 533 U.S. at 205, including mistakes of fact and mistakes of law.

As *Amici* have discussed more fully above, First Amendment student speech jurisprudence is anything but clear, with courts diverging widely in their application of this Court's precedents. The procedural history in this case demonstrates this lack of clarity in the "*specific* contours of the law" and clearly shows that Principal Morse was not "plainly incompetent" and that she did not "knowingly violate the law." In fact, the federal trial judge, applying *Fraser*, ruled that she did not violate the student's First Amendment rights, since a school district is permitted to regulate speech that "might undermine the school's basic educational mission." The Ninth Circuit, however,

determined that Frederick's punishment for displaying his banner was "best reviewed under *Tinker*, rather than *Fraser*" and required the school district to show a "substantial disruption to its educational mission" to justify the discipline. *Frederick*, 439 F.3d at 1123. Even if *arguendo* the Ninth Circuit correctly applied *Tinker* rather than *Fraser* and rightly found that the school district failed to meet the substantial disruption bar, in light of the district court's determination her actions were lawful, Principal Morse's "mistakes" on the law and the facts must be deemed at least reasonable, thus entitling her to qualified immunity.

The Ninth Circuit's determination that Principal Morse should have known that her actions were violating Frederick's clearly established free speech rights not only flies in the face of this Court's qualified immunity doctrine but also is at odds with the determination of other courts that student free speech jurisprudence is "unsettled water. . .rife with rocky shoals and uncertain currents." *Guiles*, 2006 WL 2499083 at *2. In granting qualified immunity to school administrators who disciplined a student for displaying a Confederate flag on school grounds, the Eleventh Circuit stated:

> . . .we cannot conclude that pre-existing law dictates or truly compels the conclusion that the *Tinker* standard should apply in the instant case to the exclusion of the Fraser standard. . . .it would be inappropriate to hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinions.

Denno v. School Bd. of Volusia County, 218 F.3d 1267, 1274 (11th Cir. 2000).

Refusing to grant immunity to school administrators despite the lack of clarity over student free speech rights will likely have the practical effect of discouraging administrators from disciplining students except when student speech causes chaos. This will undermine the ability of schools to maintain discipline and operate according to their mission and is not the result the Supreme Court intended.

CONCLUSION

This Court should grant review to clarify existing student free speech jurisprudence and the application of *Tinker*, *Fraser*, and *Hazelwood*. Qualified immunity demands that the law be clearly established before its protections may be removed. Although the *Tinker-Fraser-Hazelwood* trilogy provides some distilled standards, the contours of student free speech jurisprudence in this nation are unclear. Accordingly, the Ninth Circuit erred in denying Principal Morse qualified immunity. This Court should grant review to rectify the Ninth Circuit's error.

For the foregoing reasons, this Court should grant the petition for writ of certiorari submitted by the Juneau School Board and Deborah Morse.

Respectfully submitted,

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